

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KEVIN THURBER,	)	
	)	
Claimant,	)	<b>IC 01-516946</b>
	)	<b>02-502225</b>
v.	)	<b>03-506585</b>
	)	<b>03-515465</b>
	)	
STATE OF IDAHO INDUSTRIAL	)	<b>FINDINGS OF FACT,</b>
SPECIAL INDEMNITY FUND,	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
Defendant.	)	
	)	Filed March 6, 2007
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to the Commissioners for hearing. On June 27, 2006, Commissioners James F. Kile, R.D. Maynard and Thomas Limbaugh conducted a hearing in Coeur d'Alene, Idaho. Claimant was present and represented by Richard Whitehead of Coeur d'Alene. Thomas Callery of Lewiston appeared on behalf of Defendant State of Idaho Industrial Special Indemnity Fund (ISIF). Employer, Idaho Department of Transportation (DOT) and Surety, State Insurance Fund (SIF), previously settled with Claimant. Following submission of post-hearing briefs by the parties, the case came under advisement and is now ready for decision.

**ISSUES**

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;
2. Whether ISIF is liable under Idaho Code § 72-332;
3. Apportionment under the *Carey* formula;

4. Determination of Claimant's average weekly wage; and
5. Whether Claimant's condition is due, in whole or in part, to a pre-existing and/or subsequent injury/condition.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he has been a hard working individual, working various jobs throughout the years. He has sustained numerous injuries to his back and neck while employed with varying employers. Claimant suffered a back injury in 1992 as well as a neck injury in 1998. Claimant contends it is these injuries, combined with a July 22, 2003 neck injury, that render him permanently and totally disabled.

Defendant contends that Claimant's neck condition has been in existence since the mid-nineties. It was exacerbated in 1998, has given him pain and trouble since that time, and the 2003 accident did not significantly impact Claimant's neck condition. Defendant argues the 2003 injury does not combine with Claimant's pre-existing neck condition to render Claimant totally and permanently disabled. In fact, Defendant argues that Claimant's disability and medical restrictions all relate to his pre-2003 injuries and conditions. Defendant goes on to contend that while Claimant does suffer from serious medical conditions, he is not totally disabled.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Debra Uhlenkott, Donald N. Phillips, Melanie Judith Webb Loppnow, and Nancy Collins, Ph.D.;
2. Claimant's Exhibits A through Z, aa and cc; and
3. Defendant's Exhibits 1 through 19, including 11A.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

## **FINDINGS OF FACT**

### **Personal History**

1. At the time of hearing, Claimant was 52 years of age and residing in Lewiston, Idaho. He graduated from high school and then served, active-duty, in the Army for three years. Claimant has studied at Eastern Washington University, Spokane Community College and North Idaho College, the last resulting in a welding certificate. Claimant has a solid work record reflecting many differing occupations. Claimant has never been married and does not consider himself a “people person.”

### **Prior Injuries**

2. In 1991 Claimant injured his back while working for Spokane Transfer and Storage in Spokane, Washington. This injury resulted in a low back surgery performed by Henry Gerber, M.D., and a category 3 rating under the Washington rating system, which equates to a 10% whole person impairment rating. Claimant testified to a loss in his ability to function, physically, as he had before this injury and surgery. In fact, Claimant ended up leaving Spokane Transfer and Storage as the work was too hard on his back. Claimant then took a job with the DOT.

3. Claimant suffered a series of cervical spine injuries while working for DOT. In early 1995 Claimant wrecked a snowplow in a ditch, then sought treatment for a moderate cervical strain, which resolved in February of 1995. In late 1995 Claimant was again involved in a snowplow accident, resulting in another cervical strain, which resolved, with treatment in February 1996.

4. In 1998, while serving in the National Guard, Claimant sustained a neck injury. Jeffrey S. Hirschauer, M.D., ordered a MRI and diagnosed a left-sided C7 – T1 disc herniation. A cervical fusion was performed by Dr. Hirschauer in early 1999. Following this 1999 surgery, Claimant was unable to enjoy some of the activities he had enjoyed prior to the surgery; his water skiing ability was limited but he was still able to attempt the activity on a limited basis. Additionally, Claimant suffered in the workplace, needing to change his job duties with DOT to fit within a lighter duty regimen. Claimant was also unable to continue serving in the National Guard and was given a medical discharge in 2001. Further, Claimant's cervical spine problem became more symptomatic and physically restrictive over time. In early 2003, Bret Dirks, M.D., opined Claimant had persistent pain from the 1999 surgery, which would most likely continue and would have to be treated symptomatically. *See*: Claimant's Exhibit N, 1406.

#### **Industrial Accident**

5. On July 22, 2003, Claimant sustained a neck injury while lifting a wheelbarrow full of concrete at his job with DOT. Claimant reported to Kirk Parge, D.C., a chiropractor, who diagnosed the following: “acute sprain + spasm of cervical and thoracic spine, shoulder strain with post cervical disectomy + fusion syndrome, cervical syndrome.” *See*: Claimant's Exhibit Q, 1722. Claimant sought cortisone injections from Scott Magnuson, M.D., but no relief was gained from the shots. Claimant tried hydrocodone but was unable to handle the side-effects. Claimant sought treatment from Drs. Cooper Wester, M.D., and Hirschauer and Nurse Practitioner Ely, before seeking a second opinion at the University of Washington Spine Clinic. Richard Bransford, M.D., of the Spine Clinic, advised Claimant that there was probably nothing he could do for Claimant's cervical pain. *See*: Claimant's Exhibit L. Since that time Claimant has relied on methadone and Soma to manage his cervical pain.

6. Claimant received two ratings for his cervical spine following the 2003 injury. Dr. Stevens rated Claimant at 18% permanent partial impairment (PPI), all of which pre-existed the 2003 injury, whereas Dr. McNulty rated Claimant at 28% PPI, all of which pre-existed the 2003 injury.

7. Claimant received a series of medical restrictions following the 2003 injury. Dr. Wester provided restrictions listing drowsiness from medication, sitting for no more than 15 minutes, standing for no more than 15 minutes, lifting no more than 10 pounds, limited reaching and handling and no stooping or crouching. Dr. Parge placed Claimant on upper extremity restrictions with a 50 pound lifting restriction. Dr. McNulty classified Claimant to be capable of less-than-sedentary work. Gregory Charboneau, Ed.D., Claimant's psychologist, indicated Claimant cannot tolerate even low stress jobs, suffers from severe headaches, cannot drive due to his medications, and is depressed. *See:* Claimant's Exhibit V. Dr. Stevens gave Claimant much lighter restrictions, finding Claimant accrued no restrictions as a result of the 2003 accident, but was still restricted to lifting fifty pounds or less with limited overhead activity. *See:* Claimant's Exhibit W, 2253. Dr. Magnuson gave Claimant no restrictions on bending or squatting, but limited his walking and reaching to "occasionally." Dr. Magnuson also restricted Claimant to lifting 20 pounds or less, limited his use of arms and hands to occasional or frequent depending on the activity, and opined Claimant could sit, stand and walk for no more than 2 hours at a time. *See:* Claimant's Exhibit U, 2111. Brian DeBoer, a physical therapist, found Claimant able to work at the light-medium physical demand level according to the Dictionary of Occupational Titles during an evaluation on January 6, 2004. *See:* Claimant's Exhibit K.

8. Following the 2003 injury, DOT was not able to employ Claimant any further. The record is unclear as to whether Claimant's termination was due to his need for narcotics to aid

his chronic neck pain or the lack of light-duty work available. Claimant suffered a further decline in his personal activities. He no longer attempted to water ski, nor did he hunt after the 2003 accident, both activities he enjoyed before the accident. Prior to the 2003 accident, Claimant enjoyed helping his sister and brother-in-law on their farm in eastern Washington. At hearing, both Claimant's sister and brother-in-law testified to Claimant's decreased ability to help out around the farm following the 2003 injury. Further, there is testimony regarding Claimant's inability to drive for more than a short distance, as well as his inability to simply sit through a movie without having to move around due to pain. At hearing, Claimant testified to his inability to walk more than a city block, stand for more than twenty or thirty minutes, or lift anything heavier than a gallon of milk. During cross-examination, however, Claimant indicated that he went bird hunting "twice, maybe, four times" during the last season, would walk while hunting, would walk his dog occasionally, was capable of doing his own grocery shopping, cooking and laundry.

### **Vocational Consultants**

9. Debra Uhlenkott, a vocational consultant, evaluated Claimant and found Claimant would have a hard time finding employment due to his dependency on methadone and Soma. Ms. Uhlenkott stated that she contacted two job service consultants and six employers, evenly split between Coeur d'Alene and Lewiston. Based on these contacts, Ms. Uhlenkott concluded Claimant did not have a viable chance of gaining employment in Coeur d'Alene or Lewiston. Ms. Uhlenkott considered Claimant's education, vocational background, age, dependency on pain medication and inability to travel, then concluded Claimant is not employable.

10. Nancy Collins, Ph.D., a vocational consultant, evaluated Claimant and opined that he would be able to find employment in the Lewiston/Clarkston region. Dr. Collins noted that

Claimant's medical records documented restrictions varying from medium level work to less-than-sedentary level work. She considered Claimant's medical reports from numerous doctors and stated that the number of jobs available to Claimant was dependent on which restrictions were utilized. Dr. Collins also performed a job survey in the Lewiston area and came up with numerous jobs she felt Claimant could perform. Included in the job listings were the following: airport screener, assembly worker, precision assembler, telephone answering service operator, motor route carrier, security guard, land surveyor assistant, cashier at Ross or Home Depot and R.V. park manager. Dr. Collins went on to opine that it would not be futile for Claimant to attempt a job search. *See*: Defendant's Exhibit 1.

11. Claimant did not engage in a job search following his injury. Claimant did some work on his brother-in-law's farm to test his abilities and found he was unable to perform even the simplest tasks. When asked about retraining for a sedentary to light-duty position, Claimant expressed fear of failure. More specifically, Claimant testified to the fact that he might miss days of work due to his condition, which, in his opinion, might lead to his firing.

12. Claimant has worked in many differing fields, ranging from military service, moving, state employment, maintenance and materials testing.

## **DISCUSSION AND FURTHER FINDINGS**

### **Odd-lot**

13. A claimant can demonstrate he or she is totally and permanently disabled by proving that he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State*

of Idaho, *Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a super human effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

14. The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

- 1) By showing that he or she has attempted other types of employment without success;
- 2) By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
- 3) By showing that any efforts to find suitable work would be futile.

*Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

15. Claimant has not attempted other forms of employment since the 2003 injury. Claimant did perform some work on his brother-in-law’s farm. This was not work for wages, but simply a family member helping out around the farm. Claimant has not proven odd-lot status by use of the first prong of *Lethrud*.

16. Claimant did not search for work himself, nor did any person on his behalf actively search for employment within his physical restrictions. Debra Uhlenkott found Claimant would have a hard time finding employment. Ms. Uhlenkott contacted two job service consultants and six employers, evenly split between Coeur d’Alene and Lewiston. Ms. Uhlenkott considered the

contacts in Coeur d'Alene and Lewiston, Claimant's education, vocational background, age, dependency on pain medication and inability to travel, then concluded Claimant is not employable. Dr. Nancy Collins opined Claimant would be able to find employment in the Lewiston/Clarkston region. Dr. Collins considered Claimant's numerous medical reports and stated that plenty of jobs exist within Claimant's limitations. Dr. Collins also performed a job survey in the Lewiston area and came up with numerous jobs she felt Claimant could perform. Consequently, Dr. Collins stated that a job search would not be a futile action by Claimant.

17. While some of the job possibilities outlined by Dr. Collins might not work for Claimant, others might indeed be realistic. Ms. Uhlenkott's testimony regarding employability presumed that employers would automatically disqualify Claimant for employment based on his dependency to methadone and Soma. However, the medical evidence does not support this conclusion. Furthermore, Dr. Collins' ability to compile a list of potential employers further weakens the argument that work is not available. The Commission finds the opinion of Dr. Collins more persuasive. Therefore, the Commission finds that the Claimant has not sustained his burden of proving total and permanent disability by the second prong of *Lethrud*.

18. Regarding the third prong of *Lethrud*, and based on the analysis above, Claimant has not sufficiently shown that any efforts to find suitable work would be futile. It is clear that Claimant suffers from a great deal of pain in his cervical spine. The Commission does not discount Claimant's testimony. However, Claimant has not attempted to find a job within his physical restrictions since 2003. He lives in Lewiston, which has a variety of jobs available that Claimant has yet to attempt. The record shows Claimant can function in an educational environment and could, therefore, enroll in school or some sort of vocational training program. Further, Claimant has many different skills and enjoys working. Also, there is no conclusive

evidence in the record to indicate that Claimant's pain management medication would keep him from employment. Various witnesses tried to address whether the medications would unfairly taint an employer's view of Claimant, or whether he would fail a drug screen. The Commission recognizes that Claimant is currently taking strong medications. However, Claimant has not shown that these medications eliminate him from the workforce entirely. Furthermore, the medical records are scattered in their opinions, with some doctors giving very serious restrictions and others giving very light restrictions. No doctor has opined that Claimant's medications restrict him from performing work. Moreover, a Functional Capacity Evaluation indicated Claimant could function in the light-medium work category. Claimant has simply not shown convincingly that a search for suitable work would be futile.

19. It is clear that Claimant suffers from a serious neck and back injury. However, Claimant has not satisfied any of the three prongs of *Lethrud*. Therefore, Claimant is not totally and permanently disabled under the odd-lot doctrine.

**ISIF Liability:**

20. Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

21. As noted above, Claimant has failed to prove he is totally and permanently disabled pursuant to the odd-lot doctrine. Therefore, ISIF cannot be held responsible for any portion of Claimant's current disability.

22. Another aspect of Idaho Code § 72-332(1) is worthy of consideration in this case. Disability is a pre-requisite for ISIF liability as noted in § 72-332(1). In order to reach disability, impairment is necessary. “. . . impairment and disability are conceptually distinct; but there must be impairment for disability to exist. *A fortiori*, there must be an increased level of impairment for a new additionally compensable disability to exist.” *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). Claimant received two ratings for his cervical spine following the 2003 injury from Drs. Stevens and McNulty. Both doctors attributed all of the impairment to pre-existing conditions and injuries. The facts of this case do not support a finding of permanent physical impairment for the last industrial incident. Since it is axiomatic that there can be no disability without impairment, Claimant cannot be found to have sustained total and permanent disability from his last injury. Therefore, ISIF cannot be held liable under Idaho Code § 72-332(1) for this additional reason.

### **Remaining Issues**

23. The remaining issues (a determination of Claimant's average weekly wage, apportionment under *Carey*, and whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition) are rendered moot due to the Commission's previous determination that ISIF is not liable.

## **CONCLUSIONS OF LAW**

1. Claimant has failed to prove he is totally and permanently disabled pursuant to the odd-lot doctrine.
2. The ISIF is not liable under Idaho Code § 72-332.
3. All other issues are moot.

\* \* \* \* \*

## **ORDER**

Based on the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has failed to prove he is totally and permanently disabled pursuant to the odd-lot doctrine.
2. The ISIF is not liable under Idaho Code § 72-332.
3. All other issues are moot.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this \_\_6th\_ day of \_\_March\_\_\_\_\_, 2007.

INDUSTRIAL COMMISSION

\_/\_s/\_ \_\_\_\_\_  
James F. Kile, Chairman

\_/\_s/\_ \_\_\_\_\_  
R.D. Maynard, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_6th\_ day of \_March\_\_\_\_\_, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

RICHARD WHITEHEAD  
PO BOX 1319  
COEUR D'ALENE ID 83816-1319

BRADLEY J STODDARD  
PO BOX 896  
COEUR D'ALENE ID 83816-0896

THOMAS W CALLERY  
PO BOX 854  
LEWISTON ID 83501

sn/cjh

\_\_\_\_\_/s/\_\_\_\_\_